No. 93-630

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In The

Supreme Court of the United States

October Term, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, COUNCIL NO. 4434, *et al.*,

Petitioners,

v.

WILLIAM P. CLEMENTS, GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,

Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Circuit's *en banc* decision below correctly follow the instruction of this Court on remand that it evaluate the State of Texas' interest in linking the jurisdiction and elective base of district judges to determine whether vote dilution may be proved or remedied under the totality of the circumstances?

2. Should the Court grant certiorari to resolve a conflict between the *en banc* Fifth Circuit ruling in this case and a subsequent panel decision of the Eleventh Circuit in *Nipper v. Smith*, 1 F.3d 1171 (1993), which conflicts internally with decisions in its own Circuit and with *Thornburg v. Gingles*, 478 U.S. 30 (1986)?

3-4. Given the Fifth Circuit's holding that Texas' state district judge election system does not violate § 2 of the Voting Rights Act, should the Court grant certiorari to review the Court's refusal to accede to the Plaintiffs' and Texas Attorney General Morales' demand that, instead of ruling on the merits, the Fifth Circuit should have remanded this case to the district court to implement their "settlement," which would have replaced Texas' constitutionally required judicial election system with the Plaintiffs' subdistricting plan without a finding of violation of federal law?

LIST OF PARTIES

The participants in the proceedings below were:

Plaintiffs:

LULAC Local Council 4434

LULAC Local Council 4451

LULAC (Statewide)

Christina Moreno

Aquilla Watson

Joan Ervin

Matthew W. Plummer, Sr.

Jim Conley

Volma Overton

Willard Pen Conat

Gene Collins

Al Price

Theodore M. Hogrobrooks

Ernest M. Deckard

Judge Mary Ellen Hicks

Rev. James Thomas

Plaintiff-Intervenors:

Houston Lawyers' Association

Alice Bonner

LIST OF PARTIES – Continued

Weldon Berry

Francis Williams

Rev. William Lawson

DeLoyd T. Parker

Bennie McGinty

Jesse Oliver

Fred Tinsley

Joan Winn White

Defendants:

Dan Morales, Attorney General of Texas

John Hannah, Secretary of State of Texas

Texas Judicial Districts Board

Thomas R. Phillips, Chief Justice, Texas Supreme Court

Mike J. McCormick, Presiding Judge, Court of Criminal Appeals

Pat McDowell, Presiding Judge, 1st Administrative Judicial Region

Thomas J. Stovall, Jr., Presiding Judge, 2nd Administrative Judicial Region

B. B. Schraub, Presiding Judge, 3rd Administrative Judicial Region

Olin Strauss, Presiding Judge, 4th Administrative Judicial Region

LIST OF PARTIES – Continued

Darrell Hester, Presiding Judge, 5th Administrative Judicial Region

William E. Moody, Presiding Judge, 6th Administrative Judicial Region

Weldon Kirk, Presiding Judge, 7th Administrative Judicial Region

Clyde R. Ashworth, Presiding Judge, 8th Administrative Judicial Region

Ray D. Anderson, Presiding Judge, 9th Administrative Judicial Region

Joe Spurlock II, President, Texas Judicial Council

Leonard E. Davis

Defendant-Intervenors

Judge Sharolyn Wood

Judge Harold Entz

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RESPONDENT-INTERVENOR HARRIS COUNTY DISTRICT JUDGE SHAROLYN WOOD'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent/Intervenor Harris County District Judge Sharolyn Wood ("Judge Wood") respectfully opposes the Petition for Writ of Certiorari filed in this case because the Fifth Circuit Court of Appeals correctly followed controlling law in holding, *en banc*, that Texas' county-wide system for electing state district judges does not violate § 2 of the Voting Rights Act.

OPINIONS AND JUDGMENT BELOW

This case was decided below on remand from this Court of *Houston Lawyers' Association ("HLA") v. Attorney General of Texas*, ___ U.S. ___, 111 S. Ct. 2379 (1991). Judge Wood incorporates by reference Petitioner League of United Latin American Citizens ("LULAC") *et al.*'s (collectively "Plaintiffs'") statement of opinions and judgments below.

JURISDICTION

Judge Wood incorporates by reference LULAC's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves § 2 of the Voting Rights Act, 42 U.S.C. § 1973, set out at Pet. 2-3; U.S. Const., amends. X, XIV and XV; and §§ 7 and 7(a)(i) of the Texas Const. of 1876, set forth in Appendix B, attached to Judge Wood's Cross-Petition for Writ of Certiorari ("App. B") at 3b-5b.

STATEMENT OF THE CASE

The Proceedings Below

This case is accurately stated in the Fifth Circuit's *en banc* opinion, App. 1a-9a. Judge Wood adopts that statement with the addendum that, while this Court reversed the prior *en banc* majority opinion of the Fifth Circuit

which had held that § 2 does not apply to judicial elections, *HLA v. Attorney General*, 111 S. Ct. 2379, the Court also recognized that Texas has a special interest in linking the electoral and jurisdictional bases of state district judges, a view which had been advanced in a concurring opinion of the Court of Appeals written by Judge Higginbotham. 111 S. Ct. at 2379. This Court disagreed that a strong state interest in linking jurisdiction and electoral base necessarily precludes a § 2 challenge, but held that the weight of the state's interest must be evaluated as part of the totality of the circumstances. 111 S. Ct. at 2380-81. It remanded this case to the Fifth Circuit with specific instructions to evaluate the concerns expressed by Judge Higginbotham to determine whether vote dilution "may be found or remedied" under the totality of the circumstances. 111 S. Ct. at 2380-81.

The case was rebriefed and heard by the original three-judge panel. Fifteen months later, a two-judge majority of that panel affirmed the trial court's finding of illegal vote dilution in eight of the nine target counties over the vigorous dissent of Judge Higginbotham. Within a matter of days, the Fifth Circuit vacated the panel majority opinion *sua sponte* and ordered *en banc* review.

When the panel opinion was vacated, Attorney General Morales (a named Defendant and counsel for the State of Texas) and the Plaintiffs launched a massive media and legislative campaign in which Attorney General Morales claimed that his duty required him to "defend" the Voting Rights Act against Texas law and to replace Texas' county-wide judicial election system with the Plaintiffs' plan – a plan that would have subdivided Texas judicial districts and assigned state district judges

to state legislative districts in violation of the Texas Constitution and an entire body of Texas statutory law.[1] *See* App. at 7a-8a.

Attorney General Morales and the Plaintiffs filed their plan as a "resolution" in the Texas legislature, with the avowed intention of mooting this lawsuit, falsely representing in the preamble that subdistricting was necessary to bring Texas law into compliance with federal law. App. at 7a-8a. The "resolution" failed to receive approval of the Texas legislature. App. at 7a-8a. Attorney General Morales and the Plaintiffs also presented their "settlement" to *non-party* Texas Democratic officials for signature, but withheld it from the named state officials and Defendant-Intervenors, Judges Wood and Entz, who were *parties* to the suit. App. at 7a-8a. They then filed their plan as a "settlement" in the Fifth Circuit Court of Appeals, seeking remand to the district court for implementation instead of determination of the merits of the Plaintiffs' § 2 claims.

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[1] As originally promulgated, the plan would have assigned two judges to every Democratic legislator and one to every Republican legislator in Harris County. The Plaintiffs and Attorney General Morales subsequently changed their plan so that one judge would be assigned to each legislator and the left-over judges – intentionally including Judges Wood and Entz – would run at large. *See* App. at 8a. They avowed that in this way they could deprive Judges Wood and Entz of standing to challenge their "settlement" since they would still be elected at large. App. at 8a; Pet. at 24 n.16. The Fifth Circuit rejected this claim and held that Judges Wood and Entz were not deprived of standing to pursue the defense of this case. App. at 18a n.12, 19a, 21a.

The Defendant-Intervenors moved to realign Attorney General Morales with the Plaintiffs and to allow the Defendant-Intervenors to assume the State's defense of the case. App. at 8a-9a. Judge Wood also moved to disqualify Morales as counsel for the State on a number of federal and state constitutional grounds and state statutory grounds. App. at 9a. Judges Wood and Entz were supported by three former Chief Justices of the Texas Supreme Court (both Democrat and Republican) as amici. App. at 8a. Sitting Chief Justice Phillips of the Texas Supreme Court, a named Defendant, sought and was granted independent representation on the ground that the Texas Attorney General refused to represent him. App. at 9a. He opposed the "settlement." Attorney General Morales moved to disqualify the Chief Justice's counsel, a motion which the Fifth Circuit denied. App. at 9a.

On August 23, 1993, following oral argument which concentrated on both the merits of the Plaintiffs' § 2 claim and the authority of the Texas Attorney General to change state laws of general application by way of "settlement" without a proven violation of law and in violation of many federal and state constitutional and statutory laws, the *en banc* Court, in a 9 to 4 opinion, held that Texas' county-wide judicial election system did not violate § 2 in any of the target counties. App. at 86a. The Court held, "one thread runs throughout the Plaintiffs' case in all of the counties – an *insubstantiality of proof* that the minority preferred candidate lost on account of race." App. at 87a (emphasis added).

The *en banc* Court denied the Plaintiffs' and Texas Attorney General's request to remand for implementation of their "settlement." App. at 21a-28a. It also denied

Attorney General Morales' motion to disqualify Chief Justice Phillips' counsel and the Plaintiffs' post-hearing motion to nonsuit the non-compliant Texas officials. App. at 17a. It denied Judges Wood's and Entz's motions to realign but reserved the right to reconsider "if the Attorney General changes his views on the merits of the case." App. at 17a.[2] It denied Judge Wood's motion to disqualify. App. at 18a. Judge Wood has filed a cross-petition for writ of certiorari on the Fifth Circuit's denial of her motions to realign and disqualify.

Statement of Facts

Judge Wood adopts LULAC's statement of facts with the following additions and clarifications:

First, while including statistical tables purporting to show a proportional short-fall of minority judges from total minority population in the target counties, the Plaintiffs omit from their statement of facts unchallenged evidence that the percentage of minority judges exceeds the eligible constitutionally qualified judicial applicant pool (*e.g.*, 3.8% of all attorneys in Harris County were black at the time of trial versus 5.1% of all Harris County district judges, App. at 318a).

Second, and more importantly, the Plaintiffs misstate the degree of interest the State of Texas takes in ensuring

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[2] Attorney General Morales had filed briefs prior to the three-judge panel hearing on remand supporting the State's "compelling interest" in its county-wide judicial election system as a "fundamental right," *see* App. at 76a, a position he later publicly disavowed.

that its state district judges are elected by – and accountable to – *all* of the people over whom they have primary jurisdiction. The Plaintiffs allege that Texas district courts are created by statute. Pet. at 9. *Specific* district courts are indeed created by statute, but Texas' county-wide judicial election system is prescribed by Article 5 § 7 of the Texas Constitution, and the manner of creating new district courts is prescribed by Article 5 § 7a. App. B at 4b-5b. Plaintiffs then assert that state district court jurisdiction is statewide. Pet. at 10. This statement is incorrect and misleading. The *en banc* Court explored in detail the errors in the Plaintiffs' claims that Texas does not *really* insist on linking jurisdiction and electoral district. App. at 79a-83a.

Essentially, Texas has numerous constitutional and statutory safeguards which ensure that judges exercise primary jurisdiction only within the county from which they are elected and that only the judges elected by all of the citizens of that county have such jurisdiction. App. at 4a-5a, 70a, 76a-83a. In its *en banc* opinion, the Fifth Circuit pointed out that "[b]y making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence," and it "attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction." App. at 70a. Thus to state (as the Plaintiffs do) that district courts are "statutory" and that their jurisdiction is "statewide" serves to denigrate and distort the fundamental structure, purpose,

importance and history of Texas' county-wide district judge election system.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S *EN BANC* DECISION CORRECTLY FOLLOWS THE MANDATE OF THIS COURT IN *HLA V. ATTORNEY GENERAL OF TEXAS* AND APPLICABLE PRECEDENT.

The Fifth Circuit's *en banc* decision on remand followed exactly the instructions of this Court. In *HLA v. Attorney General of Texas*, this Court, while reversing the *en banc* majority holding that state district judges are not "representatives" within the meaning of § 2, specifically addressed the concurrence, stating,

> In a separate opinion, portions of which were joined by five other judges, Judge Higginbotham expressed his disagreement with the majority's conclusion that judges are not "representatives" within the meaning of the [Voting Rights] Act, but concurred in the judgment of reversal. His opinion relied on a distinction between state appellate judges and trial judges. . . . [T]he Texas trial judge has jurisdiction that is coextensive with the geographic area from which he or she is elected and has the sole authority to render final decisions. Judge Higginbotham's opinion characterized trial judges "as single-office holders instead of members of a multi-member body," 914 F.2d, at 649 (concurring opinion), because each exercises his or her authority independently of the other judges

> serving in the same area or on the same court. Given the State's "compelling interest in linking jurisdiction and elective base for judges acting alone," Id., at 651, and the risk that "attempting to break the linkage of jurisdiction and elective base . . . may well lessen minority influence instead of increase it," Id., at 649, by making only a few district court judges principally accountable to the minority electorate rather than making all of the district's judges partly accountable to minority voters, he concluded that elections for single-member offices, including elections for Texas district court judgeships, are exempt from vote dilution challenges under § 2.

HLA v. Attorney General, 111 S. Ct. at 2379.

The Court remanded this case to the Fifth Circuit with instructions to evaluate the concerns expressed by Judge Higginbotham under the totality of the circumstances, stating,

> [W]e believe that the State's interest in maintaining an electoral system – in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters – is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, and the Fifth Circuit has expressly approved the use of this particular factor in the balance of considerations. See *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (CA5 1973), *aff'd sub nom. East*

Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 96 S. Ct. 1083 47 L. Ed. 2d 296 (1976).

Houston Lawyers', 111 S. Ct. at 2380-81.[3]

The *en banc* Court did exactly as this Court instructed. In a 147 page opinion, the Court first addressed the Plaintiffs' and Attorney General Morales' attempt to "settle" this case – a critical issue which arose on remand calling into serious question the efficacy of the defense of this case. App. at 9a-32a. Second, the Court addressed the standard of proof of racial bloc voting as established by *Whitcomb v. Chavis*, 403 U.S. 755 (1971) and *White v. Regester*, 412 U.S. 755 (1973), the cases from which the results test is derived,[4] the 1982 amendments to the Voting Rights Act, and *Thornburg v. Gingles*, 478 U.S. 30. App. at 28a-58a. Third, the Court addressed other legal errors affecting the trial court's vote dilution inquiry. App. at 59a-68a. Fourth, the Court addressed Texas' interest in linking jurisdiction and electoral district, in relation to the "totality of the circumstances," the

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[3] The passage from *Zimmer* referenced by the Court states,

> Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a *strong state policy divorced from the maintenance of racial discrimination*, *Whitcomb v. Chavis*, 403 U.S. 755 (1971), would require a holding of no dilution.

Zimmer, 485 F.2d at 1305 (emphasis added).

[4] *See* S. Rep. 97-417, *reprinted in* 1982 U.S. Cong. & Admin. News, 192.

specific issue this Court asked it to address. App. at 69a-86a. Finally, it addressed the evidence regarding each target county, finding insubstantial proof of vote dilution in each. App. at 86a-120a.

The Plaintiffs' claim that the Fifth Circuit's *en banc* opinion "refused to apply *Gingles* to this case" and refused to follow this Court's instructions on remand is simply not true. *See* Pet. at 15. The Fifth Circuit's task, as it saw it, was to correct "[s]ignificant legal errors" in the trial court's judgment "including its refusal to consider the effect of partisan voting, its finding of liability in Travis County now undefended, its selective aggregation of language and ethnic minorities, its refusal to accord weight to the State's linkage interest in the totality of the circumstances, and finally, its heavy reliance upon historical societal discrimination without bringing this history home to this case." App. at 25a. The Court concluded, "We cannot escape this error-correcting task – and when it is done, there is no case." *Id.*

Citing to this Court's instruction to determine on remand whether the weight of Texas' interests in linking jurisdiction and electoral district "outweigh proof of racial vote dilution," App. at 75a (quoting 111 S. Ct. at 2381), the *en banc* Court concluded that the weight of Texas' interest was assigned by *Gregory v. Ashcroft*, ___ U.S. ___, 111 S. Ct. 2395 (1991), decided the same day as *HLA v. Attorney General*. App. at 91a. Specifically, since "the authority of the people to determine the qualifications of their most important government officials . . . lies at the heart of representative government..[,] the States' power to define the qualifications of their office-holders

has force even as against the proscriptions of the Fourteenth Amendment." App. at 76a (quoting *Gregory*, 111 S. Ct. at 2402, 2405). Thus *Gregory* requires a clear statement from Congress to permit a federal statute to override State qualifications for important State offices. App. at 76a.

Following *Gregory*, the Fifth Circuit held that Texans "have at least a substantial interest in defining the structure and qualifications of their judiciary," and that "[l]inking electoral and jurisdictional bases is a key component of the effort to define the office of district judge." App. at 76a. The Court further held that there was no evidence that the linkage between jurisdiction and the electoral base of Texas district judges was "created and consistently maintained to stifle minority votes" and that breaking that linkage "would perversely lessen minority influence on the conduct of most litigation," App. at 78a. Having held that Texas' interest in its county-wide judicial election system was substantial, the Court further held that "plaintiffs cannot overcome a substantial state interest by proving insubstantial dilution." App. at 86a. The Court then examined each target county in turn and held that the evidence of vote dilution was "insubstantial" in each and, therefore, "under controlling law, the evidence will not support the findings of liability." *Id.*

The Plaintiffs' contention that the Fifth Circuit should have reviewed the judgment of the trial court on a "clearly erroneous" basis but that, instead, it "ignored the findings of the district court" and "made its own factual findings with regard to the State's interest and declared that these were matters of law to be determined *de novo* by the appellate court," Pet. at 18, entirely misses the point and fails to show any reason why certiorari should be granted.

II.

THERE IS NO LEGALLY SIGNIFICANT CONFLICT BETWEEN THE CIRCUITS.

The Plaintiffs claim that the Fifth Circuit's *en banc* ruling generates a conflict with the Eleventh Circuit. Pet. at 19. This is incorrect. *After* this case was decided by the Fifth Circuit, a panel of the Eleventh Circuit chose to ignore *both* the *en banc* decision in this case *and* previous precedent within its own circuit in order to create a result which conflicts with both, as well as with overwhelming Supreme Court and legislative authority and the plain language of § 2 itself. *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1990).

Specifically, in *Nipper*, Senior District Judge Atkins, sitting by designation on the Eleventh Circuit Court of Appeals, held that plaintiffs can establish a § 2 violation simply by proving the threshold *Gingles* factors, which, in turn, requires only statistical proof of divergence between black and white voting patterns, *i.e.*, proof of "racial polarization." *See Id.* at 1182. Other factors – such as the *Zimmer* factors approved by this Court in *Gingles* – are relevant only "to the extent that they are supportive of the three core *Gingles* factors, however, they need not be present to satisfy the *Gingles* test." *Id.* at 1178.

The *Nipper* court also drew a number of subordinate legal conclusions necessary to support its finding of illegal vote dilution in Florida judicial races, including the conclusions (1) that the district court's decision to discount the probative value of six races that took place between 1972 and 1984 as "stale" was incorrect, 1 F.3d 1178; (2) that courts can simply assume that if no blacks

have run for office in the recent past (as they had not in the challenged districts) the reason is discrimination, *id.*; (3) that the election of white candidates supported by blacks is no evidence of lack of dilution, *id.* at 1179-80; (4) that actual local factors affecting judicial races, such as incumbency, can be used to explain minority candidates' success "despite white bloc voting" but not to explain their lack of success, *id.* at 1181; and (5) that a comparison of the number of minority judges to the *eligible* minority population "is not responsive to the question of whether the Florida judiciary adequately reflects the racial and ethnic diversity of the citizens of Florida," but instead, the question is "whether the number of minority judges reflects proportionately the number of minorities of the general population." *Id.* at 1183 and 1182 n.10.

Nipper is indeed at odds with the Fifth Circuit's painstaking analysis of the standard of proof of illegal vote dilution as applied to Texas judicial elections. The *Nipper* court itself, however, recognized the internal division within its own Eleventh Circuit regarding the issues whether vote dilution can be proved simply by proof of racially polarized voting and whether defendants can raise a defense under the totality of the circumstances. *Nipper*, 1 F.3d at 1178 n.11 and 1182 (citing *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) and *Hall v. Holder*, 955 F.2d 1563, 1528 n.9 (11th Cir. 1992)). Even more significantly, the *Nipper* opinion contradicts the wording of § 2 itself, which proclaims that it does *not* establish a right to proportional representation, 42 U.S.C. § 1973(b), and it contradicts *Gingles*, which holds,

> First, . . . Plaintiffs must demonstrate that, under the totality of the circumstances, the devices

> result in unequal access to the electoral process. *Id.*, at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.*, at 33.

Gingles, 478 U.S. at 46, 106 S. Ct. at 2764.

Judge Wood suggests that Supreme Court review is unnecessary to determine whether this case or *Nipper* is right. As a panel opinion that ignores and contradicts not only binding precedent in its own circuit but all precedent outside it, including the face of § 2 itself and controlling law as established by this Court, *Nipper* is an aberrant case that should be resolved by the Eleventh Circuit, not by this Court.

III.

THE FIFTH CIRCUIT CORRECTLY HELD THAT REMAND FOR CONSIDERATION OF PLAINTIFFS' SETTLEMENT WAS NOT APPROPRIATE.

The third and fourth issues the Plaintiffs raise as questions for certiorari – essentially whether the Fifth Circuit should have remanded their and Attorney General Morales' "settlement" for implementation – are moot in light of the Fifth Circuit's *en banc* holding that Texas' district judge election system does not violate § 2.

If this Court grants certiorari on any issue, it should grant it on the merits, not on the Fifth Circuit's proper refusal to remand a case for "settlement" where there is no violation of law. *See* App. at 18a-28a. Only a violation

of federal law would trigger the Supremacy Clause to permit alteration of Texas law without compliance with Texas' requirements, and the Fifth Circuit has held there is no such violation. Nor could any ruling of this Court place the parties in the *status quo ante*. Therefore, certiorari should be denied on this issue.

In the interests of equity, however, if this Court should grant certiorari on any issue going to the merits of this case, the Court should also grant Judge Wood's cross-petition for certiorari on the issue of the realignment and disqualification of the Texas Attorney General. As elaborated in the Fifth Circuit's *en banc* decision, Texas Attorney General Morales and the Plaintiffs made a bold grab for political power, entirely outside all law and authority, attempting to impose their political preference for judicial subdistricts on Texas by "settling" this case instead of complying with Texas' time-honored methods for amending its Constitution and laws. App. at 10a-28a. Their "settlement" failed to win approval from the Texas legislature and was, of course, never submitted to the Texas voters as required for any change of the Texas Constitution. The Fifth Circuit, in its turn, refused to order a rubber-stamp remand so that the Plaintiffs and the Attorney General could implement their "settlement." App. at 18a-28a.

The Fifth Circuit cited sound authority for refusing to permit Attorney General Morales' and the Plaintiffs' end-run around the law and for permitting the Defendant-Intervenors to carry forward the State's defense, given the Attorney General's refusal to do so. Authorities circumscribing the Texas Attorney General's power include *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (*en banc*);

Terrazas v. Ramirez, 829 S.W.2d 712 (Tex. 1991); *Public Utility Commission of Texas v. Cofer*, 754 S.W.2d 232, 235 (Tex. 1988). Authorities setting limits on consent decrees that affect matters of public interest and curtail the rights of others, including intervenors, include *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); and *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981).

Judge Wood's only disagreement with the Fifth Circuit's rulings on Attorney General Morales' activities in this case is its refusal at this time to realign Attorney General Morales personally as a Plaintiff, given his disavowal of his own briefs at oral argument and his public repudiation of the defense of this case, and to disqualify him as counsel for the defense.

Judge Wood has filed herewith a cross-petition for writ of certiorari on the ground that the Fifth Circuit's refusal to realign the Texas Attorney General as a party and to disqualify him and his staff as counsel for the State of Texas conflicts with prior decisions of the Fifth Circuit itself and applicable decisions of the Texas Supreme Court and of this Court and raises important questions of federal law which should be decided by this Court.

If this Court grants certiorari and hears oral argument on the merits of this case, the State of Texas will have no defender, since the Court does not permit shared oral argument, and the Texas Attorney General has made his refusal to defend Texas law abundantly clear. The Court should therefore grant Judge Wood's cross-petition and allow Judge Wood to carry forward the defense of

the State of Texas on any issues on which the Court grants certiorari.

CONCLUSION

For the foregoing reasons, Respondent Harris County District Judge Sharolyn Wood requests (1) that the Court deny Plaintiffs LULAC *et al.*'s petition for writ of certiorari or (2), in the alternative, if it grants certiorari, that it also grant her cross-petition for writ of certiorari, realign Texas Attorney General Morales as a Plaintiff and disqualify him and his staff as counsel for the defense, and affirm the opinion and judgment of the *en banc* Fifth Circuit Court of Appeals on the merits.

Respectfully submitted,

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